flict exists among this Court's own precedents, then that is more reason, not less, to grant the petition.

2. The CEC further argues that the Ninth Circuit's interpretation of the federal preemption provision was correct in any event. Opp. 8-10. This is not the place to debate fully the merits of the underlying substantive issues, nor is there space to do so, but several points in this regard cannot go unanswered. *First*, it defies credulity to argue that "the court of appeals did not rest its ruling on the 'presumption against preemption.'" *Id.* at 8. The presumption was outcome determinative in the decision below. At every turn—twelve times in all—the Ninth Circuit justified its interpretation by invoking the "narrow interpretation" that the presumption against preemption supposedly authorizes. The court employed a "narrow interpretation" to justify its interpretation of each of the key statutory terms. Pet. App. 7a, 14a. The court did not "independently appl[y] traditional 'rules of statutory construction,'" Opp. 8; its analysis was affected and infected throughout by its improper application of the presumption against preemption.

Second, the Ninth Circuit's interpretation of the term "disclosure of information" is untenable. Pet. 12; Pet. App. 21a-22a (Noonan, J., dissenting). The federal statute preempts "any State regulation [that] provides at any time for the disclosure of information," 42 U.S.C. § 6297(a)(1), and the California regulations require manufacturers to disclose copious information to the CEC. Nothing in the meaning of the term "disclosure" limits its application to "labeling directed to consumers at point of sale or use." Pet. App. 8a. It is logically erroneous to assert, as the Ninth Circuit and the CEC have done, that because disclosures to consumers at the point of sale or use are one type of "disclosure of information," *e.g.*, 42 U.S.C. § 6294, then the term "disclosure of information" comprises *only* disclosures to consumers at the point of sale or use. Opp. 8; Pet. App. 7a-8a. This is the logical equivalent of saying that because dogs are one type of animal, all ani-

mals are dogs. This argument is logically incoherent, in statutory interpretation as in life.[4]

Third, the Ninth Circuit's interpretations of the statutory terms "with respect to" and "other than" are similarly atextual. Pet. 17-20. The federal statute preempts disclosures of information that are "with respect to any measure of energy consumption." 42 U.S.C. § 6297(a)(1), 6297(a)(1)(B). The information that the California regulations require manufacturers to disclose is for the express purpose of regulating energy consumption, as the CEC itself has conceded. Pet. 17-18. Under any meaningful interpretation of the expansive statutory phrase, such disclosures are "with respect to" energy consumption. The CEC makes no substantive argument to the contrary; it simply parrots the Ninth Circuit's holding and asserts that it was "correct[]." Opp. 10.

The Ninth Circuit's interpretation of the phrase "other than" is equally flawed. The federal statute preempts disclosures of information "other than" information required by federal law. 42 U.S.C. § 6297(a)(1)(B). The Ninth Circuit, however, held that the California information-disclosure requirements are not "other than" the federal requirements because there are no federal requirements in place. Pet. App. 17a-19a. The fallacy

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[4] With regard to California's information-disclosure requirements, the CEC's blithe assertion that "appliance manufacturers have complied without apparent difficulty" since 1977, Opp. 2, is badly misleading. The very point of this lawsuit, as the CEC well knows, is that the CEC amended its regulations in 2002 to require additional and more comprehensive information disclosure, and to impose for the first time a pre-market approval requirement that would close the California market to noncompliant manufacturers. Moreover, the CEC's argument is somewhat galling. In an effort to act through conciliation rather than litigation, some manufacturers (but not all) disclosed information to CEC over the years, all the while asserting and preserving the argument that the regulations are preempted by federal law. The suggestion that partial compliance—under protest—with a less burdensome set of regulations somehow affects the merits of this case is absurd, and would create perverse incentives to race to the courthouse rather than negotiate with state regulators.

of this argument is plain. See Pet. 19-21. As Judge Noonan explained in dissent, "Where there are no federal regulations on the subject because the DOE has not promulgated any regulations, then any state regulations are 'other than' those federally required." Pet. App. 22a. Notably, the Ninth Circuit's sole support, *Puerto Rico Department of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495 (1988), is wholly irrelevant. Pet. App. 18a. That case addressed the circumstances under which federal inaction alone could preempt state regulation. 485 U.S. at 503. It said nothing whatsoever about express preemption clauses, much less the proper interpretation of the "other than" clause at issue here.

* * *

The decision below has a decidedly Orwellian quality about it. According to the Ninth Circuit, to disclose information to the government is not a "disclosure of information." Mandatory disclosures that are intended to permit the CEC to monitor energy consumption are not "with respect to" energy consumption. And, disclosures that are different from federal requirements are not "other than" those federal requirements. Compounding this dizzying uncertainty is a lingering sense of déjà vu. It is almost exactly 18 months since this Court in *EMA* forcefully reversed another Ninth Circuit decision that "indulge[d] idiosyncratic imagination," Pet. App. 22a (Noonan, J., dissenting), in its interpretation of a federal preemption provision. The Court should do the same here.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Petition for a Writ of Certiorari should be granted.

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No. 05-331

In the Supreme Court of the United States

AIR CONDITIONING AND REFRIGERATION INSTITUTE, ET AL., PETITIONERS

v.

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether certain labeling, product-marking, and data-submission requirements imposed upon appliance manufacturers by the State of California are preempted by Section 327(a)(1) of the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 926 (42 U.S.C. 6297(a)(1)).

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Energy Policy and Conservation Act (EPCA or Act), Pub. L. No. 94-163, 89 Stat. 871, was enacted in 1975 and has been amended by, inter alia, the National Appliance Energy Conservation Act of 1987 (NAECA), Pub. L. No. 100-12, 101 Stat. 103. See Pet. App. 9a-12a (summarizing development of statutory scheme). The Act is jointly administered by the Federal Trade Commission (FTC or Commission) and the Secretary of Energy (Secretary).

The appliances covered by the Act include 18 specified consumer products (*e.g.*, refrigerators, air conditioners, water heaters, and clothes washers), as well as any other consumer

products that are classified as "covered product[s]" by the Secretary. See 42 U.S.C. 6292(a). The EPCA authorizes the Secretary to prescribe "[t]est procedures" (42 U.S.C. 6293), which "shall be reasonably designed to produce test results which measure energy efficiency, energy use, water use * * *, or estimated annual operating cost of a covered product during a representative average use cycle or period of use." 42 U.S.C. 6293(b)(3). The Act directs the FTC to promulgate labeling rules for covered products. See 42 U.S.C. 6294. The label for a covered product must "disclose[]" the appliance's estimated annual operating cost (as determined under the Secretary's testing procedures) and the range of estimated annual operating costs for comparable products. 42 U.S.C. 6294(c)(1)(A) and (B). A labeling rule may also "require disclosure" of the same information on "printed matter displayed or distributed at the point of sale of such product." 42 U.S.C. 6294(c)(4). Similar testing and labeling provisions apply to certain commercial and industrial appliances. See 42 U.S.C. 6314-6315.

Other EPCA provisions require manufacturers of covered products to furnish information to the Secretary or the FTC. Manufacturers must "submit information or reports to the Secretary with respect to energy efficiency, energy use, or, * * * water use of such covered product," 42 U.S.C. 6296(d)(1); "supply to the Commission relevant data respecting energy consumption or water use" annually, 42 U.S.C. 6296(b)(4); and "provide" to the Secretary or Commission, upon request, "the data from which the information included on the label and required by the [labeling] rule was derived," 42 U.S.C. 6296(b)(2).

The EPCA also provides for "[p]reemption of testing and labeling requirements." 42 U.S.C. 6297(a) (title).[1] Section 6297(a)(1) states that the Act

> supersedes any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if—
>
> > (A) such State regulation requires testing or the use of any measure of energy consumption, water use, or energy descriptor in any manner other than that provided under section 6293 of this title; or
> >
> > (B) such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294 of this title.

42 U.S.C. 6297(a)(1).

2. Petitioners are "four major trade organizations representing appliance manufacturers nationwide." Pet. App. 2a. They filed suit in federal district court, alleging that certain regulations of respondent California Energy Resources Conservation and Development Commission (CERCDC), California's energy planning and policy agency, are preempted by 42 U.S.C. 6297(a)(1). As the case comes to this Court, three aspects of the state regulatory scheme remain at issue.

First, Cal. Code Regs. tit. 20, § 1606(a) (Pet. App. 50a-57a) requires manufacturers to file with the CERDC a significant range of information for certain appliances, including data concerning the appliances' consumption of energy. Second, Cal. Code Regs. tit. 20, § 1607(b) and (c) (Pet. App. 69a-70a)

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[1] Pursuant to 42 U.S.C. 6316, the provisions of Section 6297 govern the preemption analysis in cases involving state testing and labeling requirements for commercial and industrial appliances.

"require appliances to be labeled with the manufacturer's name, brand name, or trademark; the appliance's model number; and the date of manufacture." *Id.* at 13a. Third, for certain commercial and industrial appliances as to which no federal labeling regulations have been issued, Cal. Code Regs. tit. 20, § 1607(d)(2) (Pet. App. 70a) requires that specified energy-performance information be marked on each unit and "included on all printed material that is displayed or distributed at the point of sale." See *id.* at 17a n.11.[2] The district court held that the challenged state-law provisions are preempted by the EPCA and enjoined enforcement of those provisions against petitioners. See *id.* at 23a-44a.

3. The court of appeals reversed. Pet. App. 1a-22a.

a. The court of appeals held that the data-submission requirements of Cal. Code Regs. tit. 20, § 1606(a) are not preempted because those provisions do not mandate the "disclosure" of information within the meaning of 42 U.S.C. 6297(a). Pet. App. 6a-12a. In light of "the presumption that Congress did not intend to supplant state law," the court stated that it would "narrowly interpret § 6297(a) in general, and the phrase 'disclosure of information' in particular." *Id.* at 7a. The court explained that the phrase "disclosure of information" is used in other EPCA provisions to refer to labeling requirements, *ibid.*, and that "Congress did not use the phrase 'disclosure of information' in EPCA when it referenced manufacturers providing data to the [DOE]; instead, Congress used the phrase 'submit information or reports,'" *id.* at 7a-8a. The court also noted that its construction of the phrase

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[2] In the courts below, petitioners also asserted a preemption challenge to Cal. Code Regs. tit. 20, § 1607(d)(1) (Pet. App. 70a), which applies to specified appliances and states that the marking required by an FTC regulation, 16 C.F.R. Pt. 305, must be displayed on all units. The court of appeals held that Section 1607(d)(1) is not preempted, see Pet. App. 16a-17a, and petitioners do not appear to contest that holding.

"disclosure of information" is supported by the FTC's regulations implementing the EPCA, which use the word "disclosure" to refer to consumer-directed labeling and the phrase "[s]ubmission of data" to refer to the provision of information to regulators. *Id.* at 8a n.5 (citing 16 C.F.R. Pt. 305).

b. The court of appeals held that the marking requirements of Cal. Code Regs. tit. 20, § 1607(b) and (c) are not preempted because, under an appropriately narrow construction of 42 U.S.C. 6297(a)(1), "[t]he information required to be placed on appliances under section 1607(b) and (c) is not 'information with respect to any measure of energy consumption or water use.'" Pet. App. 14a; see *id.* at 13a-16a. The court explained that "[t]he relation between placing a manufacturer's name, the model name, and the date of manufacture on an appliance and measures of energy consumption, as defined in EPCA, is indirect, remote, and tenuous." *Id.* at 15a-16a.

c. The court of appeals held that Cal. Code Regs. tit. 20, § 1607(d)(2) is not preempted because it applies only to certain industrial and commercial appliances for which no federal labeling requirements have been promulgated. Pet. App. 17a-19a. The court concluded that, because the Department of Energy (DOE) has not yet made an affirmative decision as to the labels that should be placed on those appliances, the challenged state rules could not properly be said to mandate disclosures "other than" what federal law requires. *Id.* at 18a-19a.

d. Judge Noonan dissented. Pet. App. 21a-22a.

ARGUMENT

Petitioners do not contend that any circuit conflict exists regarding the proper interpretation of 42 U.S.C. 6297(a)(1); indeed, they identify no other case in which any court has interpreted that provision. Neither the court of appeals' articulation of the general principles that govern the construc-